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No. 84-507

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Petitioners,

vs.

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI OF T.B. & Z. REALTY AND MANAGEMENT CORPORATION, AND LESTER S. BARRITT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Certiorari should be granted to correct the failure of the United States Court of Appeals for the Seventh Circuit, in this and other cases, to apply the rules, the reasoning and the formula enunciated by the United States Supreme Court in *McDonnell Douglas Corporation* v. *Green* and its progeny with respect to the correct allocation of burdens of proof and order of presentation of proof in a civil rights case.

2. Whether, in accordance with *McDonnell Douglas Corporation* v. *Green* and its progeny, liability can exist in a civil rights case when, according to the specific findings of fact made by the District Court, the defendant has in fact articulated a legitimate non-discriminatory reason for its actions, and the plaintiff has not offered *any* rebuttal evidence.

3. Whether liability under 42 U.S.C. Sections 1981 and 1982 may lie against defendants whose statements, while found to be derogatory, had no nexus with the gravamen of the cause of action; that is, whether such liability may exist when the termination of plaintiff's discotheque activities was accomplished by another defendant in the case for reasons which the District Court found were solely legitimate and non-discriminatory.

PARTIES IN PROCEEDINGS BELOW

Plaintiff-Appellee-Cross Appellant (Respondent herein)	Coterie Seven Enterprises Corporation
Defendants-Appellants-Cross-Appellants (Petitioners herein)	T.B. & Z. Realty and Management Corporation and Lester S. Barritt
Defendant and Cross-Appellee	The Equitable Life Assurance Society of The United States

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REPORTS OF OPINIONS BELOW

The relevant decisions of the Seventh Circuit and the District Court in this case were all unpublished.

GROUNDS FOR JURISDICTION

The final decision of the Seventh Circuit sought to be reviewed herein was entered on June 21, 1984. The first order of the Seventh Circuit in this case, remanding the case to the District Court, was October 25, 1982, and an order was entered on rehearing of that decision on February 11, 1983.

This Court is granted jurisdiction to review, by writ of certiorari, the decision of the Seventh Circuit, by 28 U.S.C. Section 1254.

STATUTES INVOLVED

42 USC Section 1981 provides in pertinent part:

All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.

42 USC Section 1982 provides in pertinent part:

All citizens . . . shall have the same right . . . as is enjoyed by white citizens to . . . lease, sell, hold and convey real and personal property.

IN THE

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No.

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Petitioners,

vs.

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Respondent.

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PETITION FOR WRIT OF CERTIORARI OF T.B. & Z. REALTY AND MANAGEMENT CORPORATION, AND LESTER S. BARRITT

STATEMENT OF THE CASE

In May of 1974, The Equitable Life Assurance Society of the United States, (hereinafter "Equitable"), a New York corporation, purchased an office building in Chicago's Loop. T.B. & Z. Realty and Management Corporation, (hereinafter "T.B. & Z."), one of the

Petitioners herein, an Illinois corporation, began managing the building for Equitable in November, 1974.[1] Prior to that time, the building had been managed by T.B. & Z.'s predecessor, Turner, Bailey and Zoll, Inc. Lester S. Barritt, (hereinafter "Barritt") the other Petitioner herein, was the President of T.B. & Z.

One of Equitable's tenants in the building operated a restaurant and cocktail bar on the building's main floor, known as Cockney Pride. It was owned and operated by a corporation named Cockney Pride, Ltd. That restaurant had been a tenant of the building prior to Equitable's purchase of the building.

Moreover, as specifically found by the District Court in these proceedings, Cockney Pride was an undesirable tenant, in that rent was frequently in arrears, and its lease was violated by a failure to maintain insurance, a failure to report gross receipts, a failure to furnish a security deposit, and by alterations made to the premises without the owner's consent. Additionally, Cockney Pride sporadically operated without a valid liquor license, and for a period in 1974 its doors were padlocked by the Internal Revenue Service.

In an effort to shore up the decaying foundation of its business, Cockney Pride, as early as April, 1974, began permitting the conduct of discotheque entertainment on its premises by an Illinois corporation known as Coterie Seven enterprises, Corporation, (hereinafter "Coterie Seven"), the Respondent herein. It did so without ever receiving the permission of Equitable. Although

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[1] Pursuant to United States Supreme Court Rule 28, it is hereby represented that T.B. & Z. has no parent companies, subsidiaries or affiliates.

this entertainment began as a once-a-week concession to Terpsichore, it expanded ultimately into a nightly occurrence. In short, each evening, seven nights a week, the Cockney Pride Restaurant was transformed into a disco, pursuant to written and oral agreements between Cockney Pride and Coterie Seven. The majority of Coterie Seven's patrons were black, a fact not incidental to these proceedings, obviously.

In the fullness of time, other tenants of the building — an office building — began making complaints to T.B. & Z. and Equitable about the disco activities at Cockney Pride. The nature of the complaints involved disco enthusiasts congregating in the lobby of the building, parking their cars on the sidewalk in front of the building, and using marijuana in and around the building.

In response to these complaints, Barritt, who by that time knew that Coterie's patrons were predominantly black, wrote a letter to Equitable's Regional Manager informing him of the problem and asking for advice. Additionally, as the District Court found, Barritt made occasional derogatory racial remarks with respect to the black patrons of the disco.

Cockney Pride was requested to comply with all terms of its lease, but Cockney Pride failed to do so. Equitable filed eviction proceedings against Cockney Pride. Cockney Pride then filed for injunctive relief, alleging that that eviction was racially motivated, despite the various breaches of the lease with Equitable. Equitable's suit and Cockney Pride's countersuit were settled by an Agreed Order in December, 1975, which recited that there was no racial discrimination on the part of the defendants. This Agreed Order provided for a new lease for Cockney

Pride which, among other things, reduced the monthly rent, prohibited all evening entertainment, and provided for the cure of all previous violations of the lease. Accordingly, on or about February 15, 1976, Cockney Pride ceased to permit disco activities at its restaurant.

Coterie Seven subsequently brought the present civil rights action against Equitable, T.B. & Z. and Barritt, alleging a violation of 42 U.S.C. sections 1981, 1982 and 1985. The 1985 cause of action was dismissed, as the trial court found a lack of any conspiracy. As explained in more detail below, the various holdings of the Courts below on the Sections 1981 and 1982 claims were as follows:

1) The initial decision of the United States District Court for the Northern District of Illinois, Judge Thomas R. McMillen presiding, dismissed all claims as to Equitable and entered judgment against T.B. & Z. and Barritt.

2) The United States Court of Appeals for the Seventh Circuit reversed the dismissal of Equitable *and* the judgment as to T.B. & Z. and Barritt, and remanded for a new trial.

3) On rehearing, the Seventh Circuit altered its previous judgment to require merely additional findings of fact by the District Court, rather than a new trial.

4) On remand, the District Court reinstated the judgments against T.B. & Z. and Barritt, and again found no liability as to Equitable.

5) The Seventh Circuit affirmed the District Court on June 21, 1984.

ARGUMENT

This Court should grant Certiorari in the present case to correct the Seventh Circuit's application of the burden and presentation of proof in cases under 42 U.S.C. sections 1981 and 1982 generally, and to resolve a direct and irreconcilable conflict between the decision of the Seventh Circuit in this and other cases and applicable decisions of this Court.

As this Court is aware, the decision in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) set forth, with clarity and precision, the allocation of burdens and order of presentation of proof in civil rights cases. As the Court later summarized in one of *McDonnell Douglas'* direct descendants, *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 252-255 (1981):

> "First the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate *some legitimate, nondiscriminatory reason* for the employee's rejection." (Citation) Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (Citation)
>
> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant

> intentionally discriminated against the plaintiff *remains at all times with the plaintiff.*
>
> • • • •
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. (Citation) It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." (Emphasis added.)

At the close of trial in this case, however, in a parody of the *McDonnell Douglas* formula, Judge McMillen entered judgment against T.B. & Z. and Barritt for violations of 1981 and 1982 *despite* a specific finding that the principal motivation of both of them was business reasons, and in the absence of *any* rebuttal evidence by the plaintiff. In relevant part, the District Court found:

> "Throughout its tenancy, Cockney Pride proved to be an undesirable tenant. In addition to rent arrearages, Cockney Pride failed to maintain insurance, failed to report its gross receipts, failed to furnish the owner with a security deposit, made alterations to the demised premises without first obtaining the owner's consent and on one occasion operated without a liquor license, all in violation of its lease.
>
> • • • •
>
> (Defendant's) principal motivation in taking the actions which they did against the plaintiff was for business reasons. In that respect they acted

properly and not in violation of the law." District Court's decision of September 21, 1979, Appendix B hereto, pages 3-4 and 7-8.

Additionally, however, the District Court found:

> "[I]t is also clear that a related but secondary motivation was to rid the building of the activities of non-tenants who were predominantly black. The activities of these blacks constituted a nuisance to the tenants and therefore to the management and were undesirable from a business standpoint. The fact that they were blacks was somewhat incidental but nevertheless was a factor in the defendants' motivation. We cannot find that the defendants acted without any racial motivation or that they would have taken the same action had the plaintiff's clientele consisted merely of whites. Thus we find and conclude that race was a subsidiary motivation of the defendants' actions although not the principal one." District Court's decision of September 21, 1979, Appendix B hereto, page 8.

Both in its decision of September 21, 1979 (Appendix B hereto) and its decision on a motion for a new trial (Appendix C hereto), the District Court relied on the decisions of the Seventh Circuit in the cases of *Smith* v. *Sol D. Adler Realty Company,* 436 F.2d 344 (7th Cir. 1970) and *Moore* v. *Townsend,* 525 F.2d 482 (7th Cir. 1975). The tension between these decisions, as applied by the District Court and the Seventh Circuit even after applicable contrary decisions of this Court, provides the impetus for this Petition, as we will see. Moreover, those cases continue to present a potential problem in that, if Judge McMillen is correct, they can continue to be applied, contrary to this Court's opinions.

On the basis of *Sol D. Adler* and *Moore,* the District Court held that the *prima facie* case made out by Coterie Seven could only be rebutted by a showing by defendants that race was not a factor at all. The articulation of a legitimate, non-discriminatory reason for defendant's actions, as explicitly found by the District Court, did not, in other words, rebut that *prima facie* case and place on the plaintiff the burden to show that such reasons were mere pretext, as required by *McDonnell Douglas* and its progeny. Incredibly, though recognizing the existence of a contrary formulation in *McDonnell Douglas,* the District Court stated that it had "no alternative but to follow the foregoing Seventh Circuit Decisions of 1975 and 1970." (Appendix B hereto, pages 9-10)

On October 25, 1982, the Seventh Circuit rendered its first decision in this case, reversing the order of dismissal as to Equitable and further reversing the orders and judgments as to T.B. & Z. and Barritt and remanding the entire case for a new trial. In discussing the formulation of the respective burdens, the Seventh Circuit determined that once a *prima facie* case of racial discrimination has been made out, then the burden is passed to the defendants to prove by a preponderance of the evidence that the same actions would have been taken and the same directions given even if an unlawful purpose had not been a motivating factor. (Appendix D hereto, page 5.) Nothing was said of the delicate balance of burdens wrought by this Court in the *McDonnell Douglas* formula.

On a petition for rehearing, the Seventh Circuit refused to alter its decision vacating all orders below and remanding the case, but rather than direct a new trial,

the Seventh Circuit merely directed the District Court to make additional findings to facilitate the Seventh Circuit's review of the issues. In demarcating what the District Court's task should be, the Seventh Circuit endorsed a curious formulation which provided that if Equitable's eviction action was prompted solely by legitimate reasons, then no judgments against any of the defendants could stand. If Equitable's actions were partially motivated by a purpose to discriminate, however, then judgment should be awarded.

This "partial motivation" formulation does not, of course, take account of whether defendants could articulate a legitimate, non-discriminatory motivation, and thus shift the burden back to the plaintiff to show that this explanation is mere pretext, in accordance with *McDonnell Douglas*. The Seventh Circuit, in other words, joined the District Court in failing to apply the *McDonnell Douglas* formula, in the face of findings of fact which recognized the existence of legitimate non-discriminatory reason which, of course, would shift the burden of proving pretext to the plaintiff.

The Seventh Circuit did not stop there, however. As if to highlight the excesses of its unique formulation, in dealing with T.B. & Z. and Barritt, the Seventh Circuit stated that if communications between Barritt and Cockney Pride, and Barritt's conduct as manager of the building, were a substantial factor in causing the elimination of Coterie Seven from the premises by virtue of the new lease, then liability of T.B. & Z. and Barritt *alone* would be established. We submit that such liability in the absence of a finding against Equitable -- or, worse, in light of a finding that Equitable's actions were not

motivated by racial considerations — creates the potential for a rather Kafkaesque scenario. If, for instance, the District Court were to find that Equitable, the party with sole authority to terminate Cockney Pride's lease, was motivated *solely* by nonracial considerations, then there would be simply no nexus between Barritt's communications and actions and the actual resulting termination which gives rise to the civil rights suit herein. In short, the Seventh Circuit's formula permits a situation where Barritt and T.B. & Z. may be found liable for inducing discrimination which never occurred.

Naturally, upon remand, as if to illustrate the Law's taste for irony, the findings of the District Court were such that the above scenario is precisely what transpired. The District Court found, in its supplementary findings of fact, that Equitable was in fact motivated solely by legitimate, non-discriminatory business motives. Nonetheless, the District Court found, as apparently permitted by the Seventh Circuit, that T.B. & Z. and Barritt were liable because of their own acts and statements.

Even granting that those acts and statements bore a racial animus, they apparently were without result, since Equitable did not take the eviction action, the action on which these proceedings revolve, for any racial purpose. In short, there is simply no relationship between the actions of Barritt and T.B. & Z. and the damage allegedly caused to Coterie Seven by its elimination from the premises. Barritt and T.B. & Z. are, in effect, being punished for derogatory language which never came to any fruition.

Moreover, taking the supplementary findings of fact of the District Court together with the initial findings

of fact, it is clear that the defendants did show legitimate non-discriminatory reasons for their actions. Nonetheless, as throughout these proceedings, the District Court on remand did not require that, on this basis, the burden be shifted back to the plaintiff to establish pretext. In fact, no rebuttal evidence was ever offered by plaintiff.

On June 21, 1984, the Seventh Circuit affirmed the second decision of the District Court on the basis of sufficient evidence that racial considerations partially motivated T.B. & Z. and Barritt.

Nowhere in the proceedings below did the Seventh Circuit address the decisions of this Court that clearly provide, in formulaic manner, for a precise shifting of burdens. The formula applied by the Seventh Circuit can best be characterized as the "partial motivation" test: If the proof offered by the plaintiff and the defendant together indicates that the actions of defendant were partially motivated by racial considerations, then liability exists. Parsing this formula with the burdens of the parties, once a *prima facie* case is made out, the sole manner to defeat that case is for the defendant to show affirmatively that race was not a factor at all. This, of course, is in direct contravention to the decisions of this Court.

In addition to the direct and irreconcilable conflict between the Seventh Circuit's treatment of the civil rights statutes in this regard and that mandated by this Court, an additional factor to be considered in assessing this Petition is that the result of the Seventh Circuit's formulation, as we have stated above, is that the partial motivation test has resulted in liability of defendants who had no impact on the treatment ulti-

mately afforded plaintiff according to the finding of the District Court. In short, by confusing the formulation to be used for burden shifting, the Seventh Circuit has managed to equate derogatory language with discrimination. It has created a cause of action which can ensnare even innocent bystanders who express derogatory comments which never actually result in discrimination.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari of T.B. & Z. Realty and Management Corporation and Lester S. Barritt.

Respectfully submitted,

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APPENDICES

A. Statement of United States District Court for the Northern District of Illinois after close of all the evidence; May 11, 1979.

B. Findings of Fact and Conclusions of Law of United States District Court for the Northern District of Illinois; September 21, 1979.

C. Decision of United States District Court for the Northern District of Illinois denying motion to vacate September 21, 1979 ruling; November 9, 1979.

D. Order of United States Court of Appeals for the Seventh Circuit; October 25, 1982.

E. Order on Rehearing in the United States Court of Appeals for the Seventh Circuit; February 11, 1983.

F. Additional Findings of District Court; July 8, 1983.

G. Order of United States Court of Appeals for the Seventh Circuit; June 21, 1984.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, and T B & Z REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Defendants.

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EXCERPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, May 11, 1979, at the hour of 10:00 o'clock a.m.

APPEARANCES:

MR. HARRY P. STINESPRING
MR. BURTON A. GROSS
MR. DAVID M. MEISTER
MR. MARTIN S. KOREY

THE COURT: As I have been listening to the testimony it has been my belief or my conclusion that there really hasn't been any prima facie case against Equitable Life Assurance Society. All of the evidence with respect to Equitable seems to me to be through its agents, which would be T B & Z Realty and also Lester Barritt; that Equitable did not authorize any of the specific alleged

acts of discrimination that were committed by the other defendants, if they were committed, and really had very little knowledge about what was transpiring on the premises.

They knew there were some difficulties. But when I finished hearing the evidence on Friday I was prepared at that time to enter a finding at the close of the plaintiff's case against them for the claim against Equitable and I feel the same way. I really haven't been able to go over my notes in any great detail since that time, but I will enter a finding for the defendant Equitable at this time.

Now, as far as the other defendants are concerned I was of the impression — my belief was when I listened to the evidence on Friday that the plaintiff had apparently made out a prima facie case. Although, I had some doubt about it.

Having looked at the three statutes that the plaintiff relies on I am still not at all sure that the plaintiff has made out a prima facie case against the remaining defendants, which would be T B & Z Realty and Lester S. Barritt. I find evidence that both defendants who are remaining were cognizant of the fact that the discotheque was largely operated and frequented by black customers and also I find that Mr. Barritt did make some remarks which could be construed as derogatory toward blacks. He has denied those, but I think I am persuaded by the weight of the evidence that statements with regard to it having a reputation as a black building were made, and also referring to the discotheque or the operators of it as "niggers" was also made.

It doesn't follow from that necessarily that the reason that Mr. Barritt and T B & Z wanted to have the discotheque out of the building was because it was black. As a matter of fact, some of the more recent cases hold that after the plaintiff establishes a prima facie case,

if the defendant can show a bona fide and reasonable justification for its act, the weight of the evidence comes into play and the prima facie case is thereby rebutted.

Now, there are some 1983 cases which say that if any of the reasons for the alleged discrimination was based on race, even though there are other bona fide legitimate reasons, the act has been violated.

I am not sure what the law is with respect to Section 1981 or 1982. Probably the law is somewhat the same. But I am thinking — I believe it is the bricklayer case that came out of this circuit — I am trying to recall the name of it because neither party, I believe, has picked it up — and I am sorry that I do not have it right here. It went up to the Supreme Court. Perhaps I will think of the name of it in a minute. — did seem to hold that a bona fide business reason for not hiring blacks as bricklayers was a defense. I think the parties ought to analyze that case and see if it applies to Sections 1981 and 1982. Although, it was a 1983 case.

So, it is a little indefinite in my mind, and I think the law is somewhat unsettled, as to whether or not the defendant must show after the plaintiff has established a prima facie case of discrimination that that was not any part of its basis for decision to terminate the lease, or whatever, or whether it must merely show that it had a bona fide business reason and that that business reason was the principal reason for whatever its action might have been.

It is very difficult in this case where there undoubtedly were a heavy proportion of blacks involved and the problems that had occurred with respect to the discotheque involved blacks, to determine whether or not their presence and their activities somehow or other was one of the causes for terminating or causing the discotheque to be terminated. I have some doubt that it was.

The references that Mr. Barritt is supposed to have made to the building's nature and to the patrons of the discotheque was a description of the people who were there and he did say at one time that this black business must be discontinued but that, in my opinion, was merely a way of describing the activity. He could have said "discotheque" without referring to blacks or if it had been a white discotheque he could have called it a white discotheque. But I think certainly the overwhelming consideration that caused him to wish to eliminate the activity was because of the nature of the activity and not the nature of the people that were participating in it.

And, as I say, it is difficult to eliminate those two things when the people who are participating were 95 per cent black.

The evidence is very clear that the discotheque was an undesirable type of activity to have in a Class A or high-class professional business building in the Chicago Loop. There may have been one somewhat in the same vicinity. I would assume that there was. But that doesn't necessarily mean that it is an acceptable type of activity for that kind of a building. Obviously it does attract a large number of people at night — and in this particular instance it did so — when ordinarily the premises would not be occupied by any large number of people. That exposes the tenants to some risk that there is going to be invasion of the offices by unauthorized persons. We all know the difficulties of security in buildings in the Loop which do not have bars, restaurants or discotheque activities in them, whether they are black or not. And to have a large number of persons who are not tenants in the building at night is an invitation for illegal entrances into the office portion of the building.

Secondly, the evidence is very clear in my mind that a large number of these patrons were congregating in the lobby and congregating on the sidewalk outside the building and parking automobiles on the sidewalk, appar-

ently, partly because the garage was not available. In any event, the building manager has perfectly valid grounds for wanting to discontinue the cause of that assembly of persons whether they are black or white.

Added to that is the fact that the restaurant which had contracted with the plaintiff for this activity had not proved to be a desirable tenant for various reasons and that had caused problems. In fact, the first problem I recall hearing about antedated the discotheque activity and was some kind of a fashion show which was being conducted during the noon hour and which was not desirable from the management's standpoint. So that even though, apparently, the building was not able to get that particular activity stopped, as I recall — although, I am not sure — the adding of the discotheque to that was merely one more cause for dissatisfaction on the part of the management of the building, even though it came at a different hour. One, in a sense, led to the other as far as dissatisfaction by the building management is concerned.

I don't think that the odor of the food can be said to have any connection with the discotheque. I don't think that the fact that there was a combo playing down there really had any real disadvantage to the building because it is pretty well insulated and pretty well isolated. As I understand it, the second to the sixth floor is parking areas in any event. So that the likelihood of any tenants being disturbed by the music in an air conditioned building where the windows are all closed is very slight. I don't know what the elevator situation is. It is possible that noise could come up the elevator but I don't think that the noise was a particular factor for the tenants' complaints.

I do find that there were numerous tenants' complaints and that some of the tenants had bona fide complaints. Some apparently were the type that would complain about almost anything if they were paying their rent.

In any event, it seems to me that the principal problem of the discotheque was, No. 1, the image that it tended to create for a business building and, No. 2, the large number of non-tenant persons that were in the building, particularly in the lobby and on the outside of the building, after business hours, which creates a hazard and a — not a "nuisance" — but at least an undesirable type of situation.

So, I would like the remaining two defendants to draft up a proposed finding of fact and conclusions of law on the amended complaint based on the evidence and not upon matters which are not in evidence or which are not relevant to the issues and then I will give the attorneys for the plaintiff an opportunity to object to that and to file any proposed counter-findings or conclusions without preparing an entire integrated document.

I will ask the defendant to prepare the integrated document within a week and submit it to the Court and serve it on the plaintiff and then the plaintiff to file its objections or its counter-proposals to certain specific findings which they feel are not supported by the weight of the evidence.

In the conclusions of law I would like to have the defendant cite the cases on which they rely for the conclusions. And, of course, the plaintiff would have the opportunity to attempt to distinguish those cases or show that they are not the law by citing other cases that are to the contrary.

One other thing. It seems to me that there isn't sufficient evidence to find for the plaintiff under Section 1985. In the first place I don't believe that a corporation can conspire with its own officers or managing agents. It seems to me that was already decided in one of the other Seventh Circuit cases involving another building in the Loop. But, in any event, it seems to me that the activities that were engaged in here were individual

activities, one by Mr. Barritt and two by his corporation, which he was one of the principals in, and that he was either acting on behalf of the corporation which would bind it or he was not. Those are the only two defendants left in the case. So, I can't find any ground for a conspiracy under Section 1985. I will grant the defendants' motion on that portion of the amended complaint as well as the motion with respect to Equitable Life Assurance Company.

I don't know, frankly, whether both Section 1981 and 1982 apply to this case. I will have to rely upon the memoranda and the citations that I find in the proposed findings and conclusions.

I don't have much difficulty with the words "all persons" in Section 1981 since a corporation is a person and "all citizens" in 1982 since the corporation is a citizen. After the Monell case in the Supreme Court — and also there is a Seventh Circuit case which clearly holds that a corporation is a proper party under Section 1983, and I think the same would follow under Section 1981 and Section 1982.

In other words, a corporation can be discriminated against under 1983 and presumably under the other two sections.

Whether the language of 1982 which limits the cause of action to citizens having the same right as enjoyed by white citizens to inherit, purchase, lease, sell, hold and convey real and personal property would apply to this case or not, I have some doubt. I think it is a specific statute that was enacted with respect to owning real and personal property. And I do not believe there is any complaint by Coterie Seven with respect to those specific acts.

However, I am not going to make a finding contrary to the plaintiff on Section 1982. I think Section 1981 certainly applies to the factual situation that we have

here, if it has been proved, which, as I say, I have considerable doubt that it has. But if Section 1981 applies it doesn't really make any difference whether Section 1982 applies.

I will reserve judgment on 1982 until I do see the conclusions on the law.

I feel the same way about 42 USC Section 2000(a). That, it seems to me, is directed toward the use of public accommodations by blacks or by other persons without discrimination. Here we have a corporation which certainly can't complain that it hasn't been served in a restaurant or given accommodations in a hotel. And that seems to me to be the purpose of Section 2000(a) is. The first subparagraph is that all persons shall be entitled to the full and equal enjoyment of various things, including accommodations of any place of public accommodation, without discrimination. I really have difficulty in seeing how that particular section of the Civil Rights Act is intended to apply to a corporation which was excluded from a contractual arrangement with a tenant.

However, I am not going to make a final ruling on that until I see what some of the citations might be. I just have some doubt that that section comes into play at all in this case.

But if the plaintiff were able to prove its case I wouldn't have any doubt that the defendants' activities were intended to deprive the plaintiff from the use of the premises in this building and that the plaintiff was deprived of the use of the premises by the action of the defendant, the question really resolving down to whether or not any part of the decision was based on race as a basis for making the decision rather than the fact that race was involved as the nature of the persons that were causing the problem.

Again, I believe that if the same problem had existed in the building with a discotheque that was frequented

primarily by whites after hours — in fact, late into the morning hours — late in the evening hours and early morning hours — the building management would have taken the same position and done everything it could to eliminate that particular kind of activity in this kind of a building.

I remain still undecided as to whether any portion of the consideration that the defendant based its decision on was related in some way or other to race, whether that under the circumstances of the recent Supreme Court decisions would give the plaintiff a recovery. I am inclined to think that it would under 1983 and I am also inclined to think that race was not a motive. Race was involved but was not one of the reasons why the defendant real estate agent and Mr. Barritt sought to terminate the activities of the discotheque in this particular building.

Those are my tentative findings. They are subject to re-consideration after the parties have filed these documents I have mentioned and also after I have had a chance to examine the exhibits and refresh my recollection about the testimony and I will enter a decision after I have had a chance to do that.

If there are any exhibits that I don't have here I would like to have copies of them to the extent that you feel you rely on them on one side or the other. I will make a decision as soon as I can after I receive these two filings. One week for each side.

MR. MEISTER: Thank you, your Honor.

MR. GROSS: Thank you, your Honor.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COTERIE SEVEN ENTERPRISES CORPORATION,
an Illinois corporation,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, and T B & Z REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Defendants.

78 C 238

CERTIFICATE

I, James W. Cheek, hereby certify the foregoing is a true, accurate and partial transcript of the proceedings had in the above-entitled cause before the HONORABLE THOMAS R. McMILLEN, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on May 11, 1979.

/s/ Illegible
Official Court Reporter
United States District Court
Northern District of Illinois

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COTERIE SEVEN ENTERPRISES CORP.,

Plaintiff,

v.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, T. B. & Z. REALTY AND MANAGEMENT CORP., and LESTER S. BARRITT,

Defendants.

NO. 78 C 238

FINDINGS AND CONCLUSIONS OF FACT AND OF LAW

Plaintiff's amended complaint seeks a money judgment for an alleged violation of its civil rights. Plaintiff alleged defendants violated Chapter 42 U.S.C. §§1981, 1982, and 2000(a) and conspired to and did violate Chapter 42 U.S.C. §1985(3).

At trial, after plaintiff rested its case, defendants moved the Court to enter an order of involuntary dismissal pursuant to Rule 41(2)(b) of F.R.C.P. The Court granted said motion at the close of all the evidence as to defendant The Equitable Life Assurance Society of The United States. The Court also dismissed plaintiff's §1985(3) claim against the remaining defendants, T.B. & Z. Realty and Management Corp. and Lester S. Barritt. Plaintiff has filed its motion for rehearing as to this order.

On the basis of all the evidence heard by the court without a jury, we find and conclude:

Findings and Conclusions of Facts

1. Plaintiff is an Illinois corporation. Its seven shareholders and directors are black. Throughout its corporate existence plaintiff has primarily been engaged in the business of promoting and producing nightly discotheque entertainment at various places in Chicago.

2. Defendant, The Equitable Life Assurance Society of the United States ("Equitable"), is a New York corporation. On or about May 1, 1974, Equitable purchased the building commonly known as 150 North Wacker Drive, Chicago, Illinois ("the Building"), and remained the owner thereof until approximately June 30, 1976.

3. Defendant, T.B.&Z. Realty & Management Corp. ("TB&Z"), was incorporated under Illinois law on or about November 1, 1974. It managed the Building for Equitable pursuant to a written management agreement. The agreement provided, in part, that the compensation was based upon the occupancy of the building. Said agreement, dated May 1, 1974, was assigned to TB&Z by the management firm of Turner, Bailey & Zoll, Inc., at or about the time TB&Z was incorporated. Turner, Bailey & Zoll, Inc., had managed the Building previously to that time.

4. From and after its incorporation, Barritt was the president of TB&Z. At all times material to plaintiff's amended complaint, Barritt acted, not only as an officer and agent of TB&Z, but also as an agent for Equitable under the management agreement.

5. At all times material to plaintiff's amended complaint, Cockney Pride, Ltd., ("Cockney Pride"), formerly known as Suffolk, Ltd., an Illinois corporation, was the lessee of a portion of the basement and first floor of the Building. Cockney Pride operated a restaurant and cocktail bar in the premises and was owned and controlled by whites.

6. Throughout its tenancy, Cockney Pride proved to be an undesirable tenant. In addition to rent arrearages, Cockney Pride failed to maintain insurance, failed to report its gross receipts, failed to furnish the owner with a security deposit, made alterations to the demised premises without first obtaining the owner's consent and on one occasion operated without a liquor license, all in violation of its lease.

7. From almost the inception of its business operations, the Cockney Pride evening dinner business was unsuccessful. It had financial difficulties throughout its tenancy. On one occasion in the Spring of 1974, Cockney Pride's doors were locked by the Internal Revenue Service (IRS) and restaurant facilities in the Building became unavailable for a short while.

8. On or about April 20, 1974, plaintiff commenced conducting discotheque entertainment activities (also called "sets") at Cockney Pride's restaurant. Plaintiff continued doing so through approximately February 15, 1976, without defendants' consent. Plaintiff conducted these activities at the leased premises pursuant to several written and oral agreements between it and Cockney Pride. The sets which were originally on one evening per week were later increased to seven evenings per week. They began at 8:00 p.m. on the week days and 5:00 p.m. on the weekend days. TB&Z and Barritt became aware that the patrons of the discotheque were predominantly black, as were its owners and managers.

9. During the sets, Cockney Pride maintained personnel to operate the bar pursuant to its liquor license, and plaintiff charged admission at the door. It also maintained armed guards.

10. Tenants made complaints to defendants about the operation of the restaurant, such as food odors, poor food, fashion shows at the restaurant and display advertisements. Tenants also registered complaints about the improper parking of cars and about people congregating

in the building lobby and on the sidewalk outside of the Cockney Pride restaurant, during the "sets."

Barritt and TB&Z did not possess knowledge of plaintiff's corporate existence or the race of its owners and officers until after plaintiff's activities had been brought to a halt. Such knowledge of course is irrelevant if race was a motivation of defendants' acts.

11. On June 20, 1974, Barritt wrote a letter to Richard A. Reagan, Regional Manager of Equitable, stating that the plaintiff's activities were distressing to the tenants "by the nature of the trade that is attracted." Barritt was aware that the plaintiff's patrons were predominantly black. Barritt further stated in the same letter that "racial or ethnic references will be tough to avoid . . . since it is the clientele it has attracted as much as the combo itself that is the nuisance. Can you please have someone on your legal staff give us some guidance in this regard. We feel this issue is vital to the existing and future tenants of Randolph-Wacker." Regan, on June 25, 1974, mailed Barritt's letter to William F. Mueller, Vice President of Equitable in New York with a memo stating, "Please have the Legal Department review this request and advise if any steps can be taken to eliminate this nuisance."

12. The foregoing communications do not evidence racial motivation but a desire to avoid legal involvement on this issue. They do evidence defendants' knowledge that plaintiff was attracting a predominantly black clientele, however, and that this was creating a problem for the building. The weight of the evidence also proves that Barritt made occasional derogatory remarks about these black patrons or bystanders.

John Plowman, a building manager of 150 N. Wacker Drive, was told by Barritt that tenants had complained about the black business at night and that the niggers have to go. Barritt also made a similar statement to

Francis Gutrich, a later building manager. Barritt told Conrad Verges, the attorney for Cockney Pride, that tenants would not move into the building because it had become known as a nigger building. Frank Raffaelli, the manager of Cockney Pride, was told by Barritt that Cockney Pride would get a new lease at a reduced rent only if they would terminate the discotheque activities. All of these statements were apparently stating what Barritt believed to be facts and are not conclusive evidence of his motivation, but on the other hand they do constitute slurs and a derogatory attitude toward blacks by Barritt.

13. Barritt, Gutrich and perhaps someone from Equitable requested Richard Theil, the manager of the building's garage, to keep the garage closed for evening access. This was to harass plaintiff's clientele.

14. In 1975 Equitable filed suit to evict Cockney Pride, and Cockney Pride filed a counteraction to enjoin the eviction, stating that it was racially motivated. Both claims were settled by an agreed order in December 1975 which resulted in the termination of plaintiff's activities, the continuation of Cockney Pride as a bar and restaurant, and a new lease containing one-half reduction of the monthly rent to be paid by Cockney Pride. The agreed order also recited that Equitable did not discriminate against Cockney Pride on the basis of race, but plaintiff was not a party to said litigation and is not bound by it.

Conclusions of Law

The foregoing facts and inferences from the facts can be summarized as follows. Defendants TB&Z Realty and Management Corp. and Lester S. Barritt were primarily concerned with renting Equitable's building at 150 North Wacker Drive in Chicago, and their principal motivation in taking the actions which they did against

the plaintiff was for business reasons. In that respect they acted properly and not in violation of the law.

However, it is also clear that a related but secondary motivation was to rid the building of the activities of non-tenants who were predominantly black. The activities of these blacks constituted a nuisance to the tenants and therefore to the management and were undesirable from a business standpoint. The fact that they were blacks was somewhat incidental but nevertheless was a factor in the defendants' motivation. We cannot find that the defendants acted without any racial motivation or that they would have taken the same action had the plaintiff's clientele consisted merely of whites. Thus we find and conclude that race was a subsidiary motivation of the defendants' actions although not the principal one.

Under the law as it has developed, any degree of racial discrimination is impermissible under 42 U.S.C. §1982. In *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970), the court concluded at 349-50:

> [R]ace is an impermissible factor in an apartment rental decision and . . . it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination. [emphasis in original]

Later, in *Moore* v. *Townsend,* 525 F.2d 482 (7th Cir. 1975), the court said that race is an impermissible consideration in a real estate transaction if it played "some part" in the refusal to deal (at p. 485). Certainly under the foregoing cases plaintiff proved a *prima facie* case of violation of §1982.

As we understand these two decisions, a *prima facie* case can be rebutted only by extinguishing it, in other words, by showing affirmatively that race was *not* a factor at all. In *Drain* v. *Friedman,* 422 F.Supp. 366 (N.D. Ohio 1976), the court stated at p. 371:

> Once the plaintiff in a §1982 action has made out a prima facie case of discrimination in the rental of property, the owner must come forward and show that factors other than race were responsible for his decision not to extend a lease to such plaintiff.

Defendants have not cited any case to the contrary with respect to their burden of proof, although we note a dictum in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) which states that after a *prima facie* case is made out by plaintiff, the burden shifts to the defendants "to articulate some legitimate, nondiscriminatory reason" for their conduct (at p. 802). The court went on to say at p. 804 that the plaintiff could *rebut* this defense by showing that the stated reason was "in fact pretext." This case related to employment practices under Title VII of the Civil Rights Act of 1964, and, although doubtless pertinent to §1982, we consider the quoted language less stringent than the tests applied in the lower courts' cases cited above.

The Seventh Circuit has followed this dictum of course, but even after that it rendered the decision in *Moore* v. *Townsend, supra,* p. 8, with respect to discrimination under §1982. We believe that we have no alternative but to follow the foregoing Seventh Circuit decisions of 1975 and 1970 in the case at bar.

Another legal problem which has not been faced by the parties is whether §1982 applies to licensees of a tenant, such as the plaintiff was. The statute gives all citizens the same right as is enjoyed by whites to "inherit, purchase, lease, sell, hold, and convey real and personal property." At the most, the plaintiff corporation "held" defendants' property. Section 1982 is to be liberally applied. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). This section has been applied to the right of blacks to drive down a street in *Greene* v. *City of Memphis*, 535 F.2d 976 (6th Cir. 1976) and in *Jennings* v. *Patterson*, 488 F.2d 436, 442 (5th Cir. 1974)

and to be invited as guests to a swimming club. *Olzman* v. *Lake Hills Swim Club, Inc.*, 495 F.2d 1333 (2d Cir. 1974).

In view of the remedial nature of §1982, we find and conclude that it should be broadly construed to apply to a corporation which has a license from a tenant to do business in the building, if one of the reasons why defendants caused the license to be terminated was because of the race of the patrons of the licensee.

An alternative cause of action is stated under 42 U.S.C. §1981 which is historically *in pari materia* to §1982. In fact, the *Olzman* and *Jennings* cases recognize a cause of action under both sections of the statute.

We therefore enter a judgment for plaintiff on the issue of liability against TB&Z Realty and Management Corp. and Lester S. Barritt. Judgment is entered in favor of defendants with respect to violation of 42 U.S.C. §1985(3), since we find insufficient evidence of any conspiracy between the defendants. Plaintiff's motion to reconsider our finding in favor of The Equitable Life Assurance Society of the United States at the close of plaintiff's evidence is denied.

This case will be referred to a magistrate for taking evidence on the measure of the plaintiff's damages. Since its relationship with Cockney Pride was apparently terminable at will, and since plaintiff was terminated by Cockney Pride without any evidence of racial animus on the part of that tenant, plaintiff will be required to prove not only its loss of profits but also the period of time during which it could reasonably have been expected to receive such profits had it not been for the actions of the defendants.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

DATED: Sept. 21, 1979

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COTERIE SEVEN ENTERPRISES CORP.,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, T.B. & Z. REALTY AND MANAGEMENT CORP. and LESTER S. BARRITT,

Defendants.

NO. 78 C 238

DECISION

Defendants have filed a motion to set aside the judgment entered on September 21, 1979 or for a new trial. The motions have been briefed by both sides and the court has reviewed the evidence and also the applicable law. We find and conclude that defendants' motions should be denied.

Defendants point out that §1982 on its face apparently requires plaintiff to show disparate treatment between blacks and whites with respect to the ownership, use or other incidents of real property, citing *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974). That case does involve a price differential in the sale of real estate constituting discrimination against blacks. On the other hand, no such differential was shown in the latest case on which we relied, *Moore* v. *Townsend*, 525 F.2d 482 (7th Cir. 1975). Furthermore, in the earlier case of *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970), the trial court had found that the owner would have rejected a white tenant for the same reason that

he rejected a black tenant; the Court of Appeals nevertheless reversed because race was a factor in rejecting the black applicant.

Therefore, as the law has been developed under §1982 by the Seventh Circuit, if consideration of race constitutes any of the owner's reason for rejecting a black, this fact itself constitutes discrimination and disparate treatment of blacks. It is not necessary for the plaintiff to show that the same treatment would have been dealt to whites; the presence of a racial consideration without more makes the treatment between members of the races different and illegal.

The elimination of a requirement to show actual disparate treatment is also a practical approach to the problem. It would be speculative to find as a fact that the defendants would have treated a "white" discotheque any differently than it treated the plaintiff's discotheque. No such situation was presented, and none could be hypothetically presented with any degree of reliability. The likelihood is that if patrons of a white discotheque committed exactly the same nuisances as patrons of the plaintiff's discotheque did, defendants would presumably have attempted to eliminate the nuisances committed by the whites. Nevertheless, if in ridding the premises of the nuisance, defendants are motivated to any degree by racial considerations, the law at least in this circuit makes the defendants' actions a violation of §1982.

Defendants further base their motion on the ground that the findings in our decision of September 21, 1979 are somewhat inconsistent with the comments which we made at the close of the evidence in open court. This may be true, but our comments in open court were expressly characterized as tentative and also were subject to further examination in the light of the Seventh Circuit cases which we have discussed. When the law as construed by the Seventh Circuit is applied to the facts in the case at bar, the result is a violation of §1982.

On page 11 of their memorandum filed October 9, 1979, defendants argue that the statements attributed to defendant Lester S. Barritt are not supported by the evidence. Defendants, however, overlook the testimony supporting this finding, such as that of Frank Raffaelli, John Matthews, John Ploughman and attorney Conrad Verges. Almost all of the non-party witnesses testified that Barritt or his subordinates referred to the defendants as "niggers" in the context of discussing the discotheque and its undesirability. The motivation of Barritt and his company, T.B. & Z. Realty and Management Corp., depends upon his state of mind which must be inferred from all the evidence, primarily the language which he and his subordinates used and the actions which they took. The inference is clear from the evidence that race was a factor, although not necessarily the principal factor, motivating the actions which were taken against the plaintiffs.

In their reply brief filed October 22, 1979, defendants call attention to finding 14 that the new lease granted Cockney Pride reduced the monthly rent to one-half. This is not completely accurate, as a detailed comparison between the 1971 and the 1976 lease reveals. Therefore, the word "one-half" should be changed to the word "a." Other than that, defendants' motion to set aside our judgment of September 21, 1979 is denied.

Defendants have shown no grounds justifying a new trial. That motion is also denied.

Enter:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: November 9, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted: May 5, 1982

October 25, 1982

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. George Templar, Senior District Judge*

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Plaintiff-Appellee-Cross-Appellants

Nos. 81-2305 & 81-2363

vs.

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Defendants-Appellants-Cross-Appellees,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 78-C-238

Hon. Thomas R. McMillen, Judge

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* The Honorable George Templar, Senior District Judge of the United States District Court for the District of Kansas sitting by designation.

ORDER

Plaintiff-appellee and cross-appellant, Coterie Seven Enterprises (Coterie Seven), a corporation, was engaged in the business of conducting evening discotheque activities at various places in Chicago. One such place was at a restaurant operated by Cockney Pride, Ltd., the lessee of the lower floor level and the first floor of an office building located at 150 North Wacker Drive, owned by defendant and cross-appellee Equitable Life Assurance Society of the United States (Equitable).

Defendant-appellant and cross-appellee T.B.&Z. Realty and Management Corporation (TB&Z) managed the building for Equitable. Defendant-appellant and cross-appellee Lester Barritt (Barritt) was president of TB&Z. Plaintiff Coterie Seven brought an action against TB&Z, Barritt and Equitable claiming damages for alleged race discrimination under 42 U.S.C. §§ 1981, 1982 and 1985. In a court trial damages and other fees were awarded plaintiff against TB&Z and Barritt but the case against Equitable was dismissed. The appeal was taken by defendants TB&Z and Barritt from the judgment rendered against them. Plaintiff cross-appeals contending that the trial court should not have dismissed its claim against Equitable. Both the plaintiff and defendants challenge the methods used by the court in computing the amount of damages and attorney fees.

BACKGROUND

On or about May 1, 1974, Equitable purchased the office building at 150 North Wacker Drive in Chicago. One of its tenants, Cockney Pride, operated a restaurant and cocktail bar on the first floor of the building. Throughout its tenancy, Cockney Pride had been an unsuccessful business and, as the court found, an undesirable tenant. The rent was frequently in arrears, and the lease was violated by failing to maintain insurance, failing to report gross receipts, failing to furnish a security deposit, making al-

terations to the premises without the owner's consent, and operating, at times, without a valid liquor license. For a short while in the spring of 1974, its doors had been padlocked by the Internal Revenue Service.

On or about April 20, 1974, which would have been prior to Equitable's purchase of the building, Coerie Seven began conducting discotheque entertainment called "sets" at the Cockney Pride restaurant. Initially, these sets were held weekly, but they eventually became an almost nightly occurrence. The sets were successful, bringing large numbers of customers, most of them black, to the Cockney Pride. Coterie Seven paid rent to Cockney Pride, which actually covered the wages of the employees who operated the bar. Cockney Pride sold sandwiches and drinks as well. Coterie Seven provided security at the door, sound equipment, and a portable dance floor. Later, a permanent dance floor was installed on one level of Cockney Pride.

Other tenants in the building complained about the goings-on at the Cockney Pride. These complaints involved the large crowds of persons congregated in the lobby of the building after hours, cars parked on the sidewalk, and marijuana usage near the building. In addition, some tenants complained of food odors from the restaurant and of lingerie shows in the restaurant and the restaurant and discotheque were wholly inappropriate in a first-class office building. There was evidence that Lester Barritt, the president of TB&Z which managed the building for Equitable, decided that they had to "get the blacks out" because the building was getting the reputation as a "nigger building" and tenants were reluctant to rent offices there.

TB&Z requested Cockney Pride to discontinue the discotheque sets, but Cockney Pride refused. Barritt and various managers of the building asked Richard Theil, the manager of the parking garage, to keep the garage closed at night to discourage the "night business". Barritt

also wrote a letter to Equitable seeking advice. The letter was forwarded by Richard Reagan, the regional manager of Equitable, to Equitable's legal counsel, and Equitable later filed suit to evict Cockney Pride. Cockney Pride filed an injunction in federal court and alleged that the eviction was racially motivated. These suits were settled late in 1975. Throughout this time period, Coterie Seven continued to conduct discotheque entertainment at Cockney Pride.

In obtaining a settlement of the suits, Frank Rafaelli, the manager of Cockney Pride, was told by Barritt that Cockney Pride would get a new lease, at a reduced rent, only if the discotheque activities were terminated. Equitable and Cockney Pride entered into this new lease in early 1976. The lease prohibited evening entertainment and reduced the monthly rent by one-half.[1] On about February 15, 1976, Coterie Seven ceased its discotheque entertainment at the Cockney Pride. On or around August 1, 1976, Cockney Pride ceased all discotheque operations at its other locations and went out of business.

Coterie Seven brought this civil rights action against Equitable, TB&Z, and Barritt alleging a violation of 42 U.S.C. §§ 1981, 1982 and 1985 by tortious, racially motivated inference with an advantageous business relationship. The trial court found there was no conspiracy and dismissed the 1985 cause of action as to all defendants. It also dismissed Equitable from the entire lawsuit because Equitable did not authorize any of the actions taken against the plaintiff.

The trial court found that TB&Z and Barritt were liable for violations of Sections 1981 and 1982. The issue of damages was then referred to a magistrate who recommended that plaintiff be awarded $6,008.00 in

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[1] This provision in the new lease effectively ended the discotheque operations of Coterie Seven on Equitable's premises.

compensatory damages and no punitive damages. The district judge, who heard the evidence as to liability, approved the magistrate's findings and, in addition, awarded the plaintiffs $18,517.11 in attorney's fees. These appeals followed.

On appeal, defendants argue that there must be some showing that there was dissimilar treatment between the races else there can be no finding of discrimination. But the trial court determined from all the facts established and inferences that could be drawn from them that he could not find that defendants acted without any racial motivation or that they would have taken the same action had the plaintiff's clientele consisted merely of whites. Though stated in the negative, the trial court simply responded to the defendants' contention that there was no showing of discrimination by stating that he could not so find. The facts and circumstances considered by the court support the reasonable inference of discrimination drawn by the court. We agree that discriminatory intent is a necessary allegation in a 1981 cause of action, *Washington* v. *Davis,* 426 U.S. 299 (1976), but there was evidence of this intent and the trial court so found.

Specifically, the trial court found that the fact "that [Coterie Seven's customers] were black was somewhat incidental but nevertheless a factor in Defendants' motivation. . . . Thus we find and conclude that race was a subsidiary motivation of the Defendants' actions although not the principal one." The defendants argue that the purposeful discrimination requirement is not satisfied by a finding of race as an incidental motivation. An action, however, can be discriminatory without having race as its sole motivation. For example, in *Clark* v. *Universal Builders, Inc.,* 501 F.2d 324 (7th Cir. 1974), although it could be said that the reason for the two-tiered housing market with different prices for similar houses depending on the racial makeup of the neighborhood and the race of the anticipated purchaser was economic, the court

found a discriminatory intent, despite the argument that the primary motivation for the price structure was to maximize income.

We do not require that race must be the sole motivation in order for liability to arise under Section 1982. *Moore* v. *Townsend*, 525 F.2d 482, 485 (7th Cir. 1975); *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344, 349-350 (7th Cir. 1970). Although these were both Section 1982 cases, we see nothing in the language or the legislative history of Section 1981, which would require race to be the sole motivation for the defendants' actions before plaintiff could recover under Section 1981. An action rarely has a single motivation. To interpret Section 1981 as reaching only conduct motivated solely by racial discrimination would undermine the broad remedial purpose of the civil rights statutes.

The plaintiff, in its cross-appeal, argues that the trial court erred in dismissing Equitable Life Assurance Society, the owner of the building, at the close of plaintiff's case. Plaintiff claims that it was error because Equitable committed independent, racially discriminatory acts against Coterie Seven.

In reviewing the record we believe that the plaintiff established a *prima facie* case of discrimination against Equitable. Equitable instituted eviction proceedings against its tenant, Cockney Pride, for which plaintiff furnished discotheque entertainment on the leased premises. It was only after Barritt had informed Equitable that the racial composition of the discotheque's clientele constituted a "nuisance" that Equitable took action againt Cockney Pride to evict it and thus terminate the entertainment it provided. The claims of rent arrearages, and other legitimate grounds for eviction claimed by Equitable could have been a mere pretext for Equitable's action considering the timing of events. Furthermore, the substance of the settlement between Cockney Pride and Equitable in the eviction proceedings, which were

extremely generous to the tenant, lends further support to plaintiff's case in light of the issues raised in the litigation.

While it was acting on the advice of Barritt concerning the complaints of other tenants of the building, Equitable's own motivation for inducing the termination of the discotheque activities is the threshold issue. Equitable had legitimate grounds for terminating those activities: not only did they violate an express term of the lease, but they also generated non-discriminatory complaints from some of the other tenants of the building. If Equitable induced the termination of the discotheque activities for one of these legitimate reasons, neither it nor the other defendants are liable. On the other hand, if Equitable acted at least in part for discriminatory reasons, it is liable, as would be the other defendants given the evidence of Barritt's discriminatory purpose.

If Equitable acted out of a legitimate concern for its other tenants totally divorced from the racial concerns, the fact that one of its agents had a personal bias against plaintiff's clientele is simply irrelevant, in legal contemplation, in analyzing Equitable's own liability. Equitable was not forever barred from enforcing the terms of its lease against discotheque activities once it learned that the discotheque's clientele was predominately black or when it discovered that one of its agents was racially prejudiced. It retained the legal right to evict a tenant violating the terms of a lease so long as it did not share in its agent's racist motivation. Of course, as the district court observed, persons may have more than one motivation as a predicate to their actions, and it is a difficult task to determine whether Equitable would have taken a different approach to the situation if it had been ignorant of the racial composition of the discotheque's clientele.

If it is established that racial discrimination was a motivating factor behind the challenged activities of Equitable, then the burden is passed to it to prove by a preponderance of the evidence that the same actions would have been taken and the same directions given its agents even had an unlawful purpose not been a motivating factor. If Equitable can prove this, Coterie Seven cannot attribute its injury to racial discrimination. *See Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1976); *Lewis* v. *Bethlehem Steel Corp.,* 440 F.Supp. 949, 966 (D.Md. 1977).

The civil rights statutes do not impose liability for inchoate discrimination. If Equitable caused the termination of the discotheque activities for entirely permissible reasons, the fact that Barritt secretly or even openly delighted in that result because of a discriminatory animus towards blacks does not provide a basis upon which to award plaintiff compensatory relief. Similarly, the fact that Barritt advised his principal that in his opinion the discotheque had to be closed because of the racial composition of the clientele is not a basis for imposing liability on him if Equitable ignored that advice and proceeded to act in precisely the same way it would have acted if Barritt had kept his bigoted views to himself. On the other hand, if Barritt was actually successful in inducing Equitable to discriminate on racial grounds, he and TB&Z would be jointly and severally liable for his actions.

While defendants Barritt and TB&Z have not, in these appeals from the judgment rendered against them, claimed that the judgments against them should be reversed because they did not cause the threatened eviction which ended plaintiff's use of the premises leased by Coterie, we believe that the ends of justice would be better served by reversing the case and remanding it for a new trial.

We believe the proper rule to apply here is found in 2 Fed.Proc.L.Ed., § 3:700, where it is said:

> The question whether a joint and several judgment should be reversed in its entirety is a matter resting solely within the discretion of the appellate court, which must decide how the ends of justice may be served. Generally, a judgment will be reversed as to all parties, if the contrary would work an injustice.

Const. Pub. Co. v. *Dale,* 164 F.2d 210 (5th Cir. 1947); *Washington Gas Light* v. *Lansden,* 172 U.S. 534, 43 L.Ed. 543, 19 S.Ct. 296 (1899).

And in *Gasoline Products* v. *Champlin Co.,* 283 U.S. 494, 500 (1931), the court held:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.
> (Citations omitted.)

The liability of the defendants in this case might be found to be joint and several. In determining whether to apply principles of joint and several liability in a civil rights action, the courts look to the substantive law of the forum state. *See,* 42 U.S.C. §1988. In Illinois, when the injury caused by two or more tort-feasors is indivisible, joint and several liability must be imposed. *Koltz* v. *Jahaaske,* 312 Ill.App. 623, 38 N.E.2d 973, 975 (1942).

We hold that a claim should not be dismissed where, considering the evidence in the light most favorable to claimant and giving it the benefit of all reasonable inferences which can be drawn from the evidence, the trier of fact could reasonably sustain the claim.

The dismissal of plaintiff's claim against Equitable was error and requires a reversal of the order of dis-

missal. Because our determination of the issue of liability requires a new trial of all issues, we do not pass upon the questions submitted relating to damages and attorneys' fees.

The issues to be retried are so inseparable from the others already decided that a trial of plaintiff's actions against Equitable alone would not best serve the interests of justice.

We, therefore, reverse all the orders and judgments appealed from and direct that a new trial be granted to all the parties.

CUDAHY, *Circuit Judge,* concurring. I concur in this order remanding the case for retrial as to both parties. I would add, however, that Equitable may also be liable, on one possible state of facts, for the acts of its agent. An owner of property may be sued under 42 U.S.C. § 1982 for the acts of his agent under the doctrine of *respondeat superior. Moore* v. *Townsend,* 525 F.2d 482 (7th Cir. 1975). Discriminatory acts will be imputed to a property owner, even though his agent may have acted without the knowledge of the owner. *See Izard* v. *Arndt,* 483 F. Supp. 262 (E.D. Wis. 1980); *Martin* v. *John C. Bowers & Co.,* 334 F. Supp. 5 (N.D. Ill. 1971). In the case at hand, it is unclear to me whether the decision to institute eviction proceedings was made by the realty company or by Equitable. The contract between the two provides that negotiating leases and instituting eviction proceedings are both within the agent's duties, although the action would be taken in the name of Equitable. If the realty company was responsible for, and caused, the action to evict, therefore, and did so from a discriminatory motive, Equitable would presumably be liable as well.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Submitted May 5, 1982

February 11, 1983

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. GEORGE TEMPLAR, *Senior District Judge**

COTERIE SEVEN ENTERPRISES CORPORATION,
an Illinois corporation,

Plaintiff-Appellee-Cross Appellant,

No. 81-2305 & 81-2363

vs.

T.B.& Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Defendants-Appellants-Cross Appellees,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Cross Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 78-C-238

Hon. THOMAS R. MCMILLEN, *Judge*

---

* The Honorable George Templar, Senior District Judge of the United States District Court for the District of Kansas sitting by designation.

ORDER ON REHEARING

Defendants have presented a Petition for Rehearing in which they contend that this court premised its decision on the belief that plaintiff's claim against Equitable was dismissed for failure to establish a prima facie case, and they make the positive assertion that the trial court made no such ruling.

In response to the Petition for Rehearing, the plaintiff points out that the trial court dismissed its case against defendant Equitable under Rule 41(b), Fed.R. Civ.P., because as that court erroneously held, plaintiff had not presented a prima facie case as to Equitable. Plaintiff further suggests that, since Equitable proceeded to introduce evidence in support of its defense to plaintiff's claim, a new trial would presumably produce no new evidence on behalf of defendants on the issue of liability but that a further inquiry as to additional damages to plaintiff caused by Equitable should be afforded.

We have reviewed the trial record of this case. Pertinent portions of the record reveal that, at the close of the plaintiff's case, attorneys for the defendants presented a motion under Rule 41(b), Fed.R.Civ.P., for the trial court to enter a directed verdict in their favor and against plaintiff and to dismiss the cause with prejudice. (R.Vol.1 Doc.45).

The relevant portion of the rule relied on by the defendants provides that:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any

> judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, . . . operates as an adjudication upon the merits.

When the plaintiff rested its case (T.384), the trial court inquired of defendants' counsel whether he would have any evidence, whereupon counsel replied that he wanted to submit a written motion for a directed finding in favor of defendants and against plaintiff. The court then inquired of defendants' counsel whether he would have any evidence if such a motion was not granted. Defendants' counsel announced that there would be three witnesses. The trial court did not then rule on the motion but indicated that he would do so when the case came on for trial the following Thursday. (T.385).

When trial was resumed the following Thursday, the trial court observed that "there is at least a colorable prima facie case by the plaintiff here" and then announced, "I will deny the motion." (T.389). Thereafter, defendants proceeded to introduce evidence and rested. (T.437). The trial court then declared that it was his conclusion "that there really hasn't been any prima facie case against Equitable Life Assurance Society" and "I will enter a finding for the defendant Equitable at this time." (T.439).

The trial court filed "Findings and Conclusions of Fact and of law." (R.50) In a preliminary statement, no findings as to Equitable were made, the trial court stating that:

> At trial, after plaintiff rested its case, defendants moved the court to enter an order of involuntary dismissal pursuant to Rule [41(b)] of the Federal

> Rules of Civil Proocedure. The court granted said motion at the close of all evidence as to Equitable Life Assurance Society of the United States.

No other finding or conclusion related to defendant Equitable other than the Finding No. 14, which found in substance that Equitable had filed suit to evict Cockney Pride, that the prior action and a counter action by Cockney Pride had been settled by an agreed order which recited among other things that Equitable did not discriminate against Cockney Pride on the basis of race, but that plaintiff was not a party to said litigation and was not bound by it, and that plaintiff's motion to reconsider the court's finding in favor of Equitable at the close of the plaintiff's evidence be denied.

These findings were filed September 21, 1979. On November 19, 1979, defendants presented a motion to the trial court for a Section 1292(b) certification of the court's order of November 9, 1979 denying defendants' motion to set aside judgment and a motion for a new trial. These motions were denied, but during the presentation of the motions, the court made this statement:

> Well, actually, the issue with respect to Equitable was a failure of proof rather than the legal issue that the defendants want to take up.
> (R.20, p.5).

The record is clear that the trial court dismissed the claim of plaintiff against Equitable for the reason that, in the court's opinion, the plaintiff had failed to prove a case by its evidence. This was the trial court's announcement. His statement was unambiguous. There was no other finding on any issue of fact or law, and the trial court made a determination of no other issue as the court was bound to do under Rule 41(b) and Rule 52(a) if he had intended to make any different ruling.

We hold that the involuntary dismissal of plaintiff's claim on the grounds that there was a failure of proof

by plaintiff on its claim was reversible error absent findings of fact and conclusions of law required by Rule 52 F.R.Civ.P. for the reasons set forth in our original order.

On reconsideration, we conclude that the trial court should in the first instance determine whether the eviction action brought by Equitable against Cockney Pride was prompted in whole or in part by a purpose to discriminate against Coterie Seven when, in the settlement of that action in connection with a counter action brought against it by Cockney Pride alleging that the eviction suit was racially motivated, the parties, Equitable and Cockney Pride, entered into a new lease which provided in part that there should be no evening entertainment on the premises and that the rent was reduced fifty per cent.

This settlement resulted in the exclusion of Coterie Seven from the premises and they were not permitted to conduct any further discotheque sets there.

We further conclude that the judgments obtained by the plaintiff against defendants T.B.&Z. Realty and Management Corporation and its president Lester S. Barritt should be vacated and the cases remanded to the trial court. In the event the trial court should find and determine, subject to our review, that the eviction action by Equitable was prompted by legitimate reasons for terminating the tenancy of Cockney Pride, such as nonpayment of rent, failure to maintain insurance, failure to report gross receipts, making alterations without owners' consent, failure to furnish security deposits, operating without valid liquor license, and that the action was not motivated in whole or in part by a racially discriminatory purpose, then the dismissal of the action against Equitable would be upheld. But, if it is found that the eviction action and the new lease excluding plaintiff from entertaining on the premises was motivated

in whole or in part by a racially discriminative animus, then judgment against Equitable should be awarded.

In the event that it should be found that the eviction action was brought solely for legitimate reasons and not because of any racial discrimination motive and that the new lease made with Cockney Pride excluding evening entertainment was for valid business reasons and that the termination of the prior lease and the creation of the later one was the proximate cause of plaintiff's alleged damages, then the judgments against T.B.&Z. and Barritt would have no foundation to support them.

On the other hand, if it be found that Barritt's direct communications with the lessee, Cockney Pride, and his threats to the lessee and his conduct as manager of the leased property were a substantial factor in causing the elimination of plaintiff by the lessee from conducting sets on the premises when the new lease was made with Equitable, then the liability of T.B.&Z. and Barritt would be established and the judgments against them would be reinstated.

We, therefore, direct that the judgments against T.B.&Z. and Barritt and the order of dismissal in favor of Equitable be vacated and the causes remanded for findings by the trial court which will facilitate our review of the issues pertaining to the basis of liability of the respective defendants.

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

COTERIE SEVEN ENTERPRISES CORP.,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, et al.,

Defendants.

NO. 78 C 238

DECISION

This case comes back to us pursuant to two decisions by the Seventh Circuit Court of Appeals, the first dated October 25, 1982 and the second, on rehearing, dated February 11, 1983. The decisions, of course, are binding upon this court and the parties, and we now intend to comply with them to the extent that they are self-explanatory. We have also conferred with the parties concerning their respective understanding of the two decisions, and both sides have submitted additional proposed findings and conclusions of law. They agree that no further evidence need be taken in this case, on the issue of liability at least, and both parties have tendered most of the findings which we made on September 21, 1979 after trial. Those findings did not specifically address the issue of liability of defendant Equitable Life Assurance Society of the United States and were not so intended because Equitable had received a favorable ruling from the bench at the close of all the evidence.

The "threshold" problem causing reversal by the Court of Appeals is stated on p. 5 of the Order of October 25, 1982 to be "Equitable's own motivation for inducing the termination of the discotheque activities. . . ." The Court of Appeals further stated, as we found, that Equitable had legitimate grounds for terminating those activities, citing various business or "legitimate" reasons as contained in our findings 6, 7, and 10, *inter alia.*

The deficiency found by the Court of Appeals in our finding in favor of the defendant Equitable at the close of all the evidence pursuant to F.A.C.P. 52(a) was the failure to support this finding by specific facts and conclusions on the record at that time. We subsequently confirmed the decision in favor of Equitable by our written decision of September 21, 1979, with no findings or conclusions as to that defendant's liability.

We now adopt our written findings to apply to defendant Equitable Life Assurance Society as though made specifically at the close of all the evidence. We further find and conclude that business reasons, and not any racial motivation, was the basis of Equitable's eviction action against Cockey Pride, Ltd., its tenant, filed in the State court and settled December 17, 1975. (See Finding 14.) The filing of the lawsuit by Equitable was not a pretext for eliminating a discotheque owned and operated by blacks but was for the reason of protecting the integrity and value of its real estate. Defendant did not show that Equitable's reasons for filing the State court lawsuit were pretextual, and there is no reason to believe that this defendant would have acted any differently if the nuisance had been caused exclusively by white patrons.

A new lease was entered into between Equitable and Cockney Pride, Ltd., on March 1, 1976, generally incorporating the terms of the settlement of the State court lawsuit, except that the settlement had also pro-

vided that Equitable did not discriminate against Cockney Pride on the basis of race. The lease forbade evening "entertainment" and Coterie Seven moved elsewhere. What happened thereafter between the landlord and its tenant is irrelevant to this case, and it is our finding that plaintiff adduced no evidence of racial animus or discrimination by Equitable. In fact, we were somewhat bemused at the time of trial that plaintiff chose to proceed against Equitable at all.

We further find and conclude that the racial animus evidenced on the part of T.B. & Z. Realty and Management Corporation and its agent, the defendant Lester Barritt, were not the acts of defendant Equitable. These other two defendants were agents of Equitable for the purpose of leasing and managing the premises, but their discriminatory statements and conduct were not authorized by Equitable, were not condoned by Equitable, and were not shown to be known by Equitable, except through one business letter written by Barritt to Equitable on June 20, 1974 (Finding 11). This letter was sent to Equitable's attorneys in New York for legal guidance, but the racial innuendoes in the letter were not shown to have been adopted by Equitable. The legal action which followed was the eviction suit in the State court, filed in late 1975. As found above, there is no evidence that this action was racially motivated, and the tenant stipulated that it was not.

The fact that the lawsuit was motivated in part to eliminate a discotheque which was responsible for various violations of the law and of the previous lease is not, in our opinion, evidence of racial animus. Otherwise it would be virtually impossible for a landlord to evict an undesirable discotheque or other activity if it also happened to be frequented by blacks.

The United States Supreme Court has entered yet another decision explaining its views on the burden of proof in a race discrimination case. *United States Postal*

Service v. *Aikens*, ... U.S. ....., 51 U.S.L.W. 4354 (Apr. 14, 1983). We read that decision as meaning that the bottom line in deciding such cases, whether under § 1982 or Title VII, is on the weight of the evidence as a whole. On the basis of our findings above, having reviewed our previous findings, the findings which were adopted by the two opinions of the Court of Appeals, and the proposed findings and conclusions of the parties, it is our conclusion that plaintiff has failed to prove by a preponderance of the evidence that the defendant The Equitable Life Assurance Society of the United States committed, authorized or condoned any acts of racial discrimination or animus against the plaintiff. In short, the necessary nexus between the discriminatory acts and statements and the defendant Equitable has not been proved by the weight of the evidence.

The Court of Appeals has ruled that, if Equitable is not liable, then the judgments against T.B. & Z. Realty and Management Corporation and Lester S. Barritt "would have no foundation to support them." (Order dated February 11, 1983, p. 4). The court then added:

> On the other hand, if it be found that Barritt's direct communications with the lessee, Cockney Pride, and his threats to the lessee and his conduct as manager of the leased property were a substantial factor in causing the elimination of plaintiff by the lessee from conducting sets on the premises when the new lease was made with Equitable, then the liability of T.B.&Z. and Barritt would be established and the judgments against them would be reinstated.

We understand this last statement to indicate that T.B.&Z. and Barritt could be found liable because of their own acts and statements in causing the tenant Cockney Pride, Ltd. to terminate plaintiff's activities. Our decision of September 21, 1979 was based on the theory that these other two defendants were acting in-

dependently of defendant Equitable and were liable for their own discriminatory motives, carried out by Cockney Pride (see Findings 8 and 12 and page 10 of our Decision). For that reason we reinstate the judgment against T.B.&Z. Realty and Management Corporation and Lester S. Barritt for damages and attorneys' fees. A Rule 58 judgment will be entered against them and in behalf of plaintiff as of January 6, 1981 in the amount of $6,008 and as of July 9, 1981 in the amount of $18,517.11.

ENTER:

/s/ Thomas R. McMillen
Judge, United States District Court

DATED: JUL 8 1983

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
District: Northern District Of Illinois
Docket Number 78 C 238
Name of Judge Thomas R. McMillen

Case Title

COTERIE SEVEN ENTERPRISES CORP.

Plaintiff

v.

EQUITABLE LIFE ASSURANCE SOCIETY OF U.S., et al

Defendants

[] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the judgment against T.B. & Z and Lester Barritt for damages and attorneys' fees is reinstated. Judgment is entered against them and in behalf of the plaintiff, Coterie Seven Enterprises Corp. as of January 6, 1981 in the amount of $6,008.00 and as of July 9, 1981 in the amount of $18,517.11.

Clerk H. Stuart Cunningham
(By) Deputy Clerk /s/ Kathleen Branch

Date July 8, 1983

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
(Submitted May 5, 1982)
Reinstated August 19, 1983
June 21, 1984

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. GEORGE TEMPLAR, *Senior District Judge*•

No. 81-2305 & 81-2363

COTERIE SEVEN ENTERPRISES CORPORATION,
Plaintiff-Appellee-Cross Appellant,

vs.

T.B.& Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,
Defendants-Appellants-Cross Appellees,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant-Cross Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 78-C-238
Hon. THOMAS R. MCMILLEN, *Judge*

• The Honorable George Templar, Senior District Judge of the United States District Court for the District of Kansas, sitting by designation.

ORDER

This case comes back to us after the district court, pursuant to our Order on Rehearing dated February 11, 1983, made supplemental findings of fact. We will not reiterate the history of this case (See Order of October 25, 1982), but will address the parties' legal challenges in light of these supplemental findings.

We readily affirm the district court's apportionment of liability. Based on sufficient evidence, the district court found that racial considerations partially motivated T.B.&Z. Realty and Management Corporation ("TB&Z") and Lester Barritt to cause the termination of plaintiff's business activities at Cockney Pride restaurant. Accordingly, judgment was properly entered against TB&Z and Lester Barritt for violating 42 U.S.C. §§ 1981, 1982. The district court found that The Equitable Life Assurance Society of the United States ("Equitable"), on the other hand, acted without racial motivation. Because Equitable may not be held vicariously responsible for the other defendants' racial motives, *see General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375 (1982), the case against Equitable was properly dismissed.

Moreover, we find no error in the amount of damages awarded. In awarding the plaintiff $6,008.00 in lost profits, the district court correctly did not deduct fixed costs that the plaintiff bore whether or not it operated at Cockney Pride. These costs were not reduced by the illegal termination and thus did not provide a "savings" to offset the lost income. *See Buono Sales, Inc.* v. *Chrysler Motors Corp.*, 449 F.2d 715, 719-20 (3d Cir. 1971); *Rivenbark* v. *Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 346 N.E.2d 494 (1976). We do not agree with the plaintiff, however, that the $6,008.00 award must be increased. Greater compensatory damages would be unduly speculative, *see generally Hannigan* v. *Sears, Roebuck and Co.*, 410 F.2d 285, 293 (7th Cir. 1969), and this

is not the type of case that demands a punitive award, *see Smith* v. *Wade*, 103 S. Ct. 1625, 1638-40 (1983).

Finally, we hold that the district court did not abuse its discretion in awarding the plaintiff $18,517.11 in attorneys' fees. The plaintiff succeeded in its only claim —i.e., damages for the racially motivated termination. The starting point for calculating fees, therefore, was the product of the number of hours worked and a reasonable rate of compensation. *See Blum* v. *Stenson*, 104 S. Ct. 1541, 1548 (1984). No automatic deduction was required because the damages awarded were less than the prayer, *see Henseley* v. *Eckerhart*, 103 S. Ct. 1933, 1940-41 n.11 (1983), nor because judgment was not entered against Equitable, *see Mary Beth G.* v. *Chicago*, 723 F.2d 1263, 1281 (7th Cir. 1983). The district court did exercise its discretion to exclude from the fee calculus time spent on redundant, excessive, and otherwise unnecessary matters. *See Hensley* v. *Eckerhart*, 103 S. Ct. 1933, 1940 (1983). The resultant figure was reasonable and not, as TB&Z and Lester Barritt maintain, disproportionately large in light of the judgment obtained. *See Coop* v. *South Bend*, 635 F.2d 652 (7th Cir. 1980) ($6,000 fee award appropriate notwithstanding recovery of only $510 in damages).

The judgments of the district court are therefore affirmed. The plaintiff's costs on appeal are taxed against TB&Z and Lester Barritt. Equitable will bear its own costs.

Office-Supreme Court, U.S.
FILED
OCT 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Petitioners,

vs.

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the rules and reasoning for the burden of proof enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* and *United States Postal Service v. Aikens* and as followed by the trial court sitting as the trier of fact and the Court of Appeals in their opinions correctly applied by these same courts as no new issue was presented.

PARTIES IN PROCEEDINGS BELOW

Plaintiff-Appellee-Cross-Appellant (Respondent herein)	Coterie Seven Enterprises Corporation
Defendants-Appellants Cross-Appellants (Petitioners herein)	T.B. & Z. Realty and Management Corporation and Lester S. Barritt
Defendant and Cross-Appellee	The Equitable Life Assurance Society of the United States

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In The

Supreme Court of the United States

October Term, 1984

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Petitioners,

vs.

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Coterie Seven Enterprises Corporation respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Seventh Circuit.

COUNTERSTATEMENT OF FACTS

Due to the arguments as follows, Respondent Coterie Seven Enterprises Corporation deems unnecessary any counterstatement of facts.

REASONS WHY THE WRIT SHOULD BE DENIED

The Trial Court and the United States Court of Appeals specifically citing this Court's decisions in the *McDonnell Douglas Corp. v. Green* and *United States Postal Service v. Aikens* cases properly applied the burden of proof in this case.

ARGUMENT

Petitioners have sought to create a controversy where none exists. Petitioners attempt to rely upon an alleged improper apportionment of the burden of proof which they contend controverted the United States Supreme Court decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, both the District Court and the Seventh Circuit Court of Appeals specifically followed the dictates of the *McDonnell Douglas* case. In its decision of September 21, 1979, the District Court specifically noted *McDonnell Douglas* by stating on page 9:

> "that after a *prima facie* case is made out by the Plaintiff, the burden shifts to the Defendants to articulate some legitimate non-discriminating reason for their conduct." (p.802)

Further, in its opinion on remand the District Court noted the more recent case of *United States Postal Service v. Aikens*, ... U.S. ....., 51 U.S.L.W. 4354 (April 14, 1983) and stated:

> "We read [*Aikens*] as meaning that the bottom line in deciding such cases . . . is on the weight of the evidence as a whole." (p.4)

Similarly, the Seventh Circuit decision of October 25, 1982, stated clearly on page 5:

> "If it is established that racial discrimination was a motivating factor behind the challenged activities of Equitable, then the burden is passed to it to prove by a preponderance of the evidence that the same actions would have been taken and the same directions given its agents even had an unlawful purpose not been a motivating factor. If Equitable can prove this, Coterie Seven cannot attribute its injury to racial discrimination."

Petitioners suggest that by finding that Equitable acted without discriminatory reasons it is somehow an anomaly that T.B. & Z. and Barritt could be found guilty of any discriminatory conduct. This completely ignores the District Court's findings. T.B. & Z. and Barritt specifically negotiated extremely favorable lease terms to a supposedly undesirable tenant—the only concession being the elimination of Plaintiff's activities. The District Court's decision on remand page 5, specifically found that the Defendants T.B. & Z. and Barritt ". . . could be liable because of their own acts and statements in causing the tenant Cockney Pride to terminate Plaintiff's activities." The basis of the original judgment against these two Defendants as well as the judgment on remand was that T.B. & Z. and Barritt were acting independently of Equitable and were liable for their own racially discriminatory actions which were coerced upon and carried out by the tenant. There is no incongruity where one Defendant's actions are independent of another and one course of conduct is found discriminatory and the other innocent.

In summary, both the District Court and the Seventh Circuit Court of Appeals specifically recognized that the Plaintiff had the initial burden of proving its *prima facie* case. Both the District Court and the Seventh Circuit

Court found that after a *prima facie* case is presented, the burden shifts to the Defendant to show that there is a legitimate business reason for his actions. Both the District Court and the Seventh Circuit found the Defendants, T.B. & Z. and Barritt failed to establish a legitimate business reason for its racially discriminatory actions. However, both the District Court and the Seventh Circuit believed Equitable had not known of or authorized the conduct of their agents. Thus, after weighing the evidence as a whole the District Court, as a trier of fact, specifically found that T.B. & Z. and Barritt had failed to establish that their actions would have been the same had race not been a motivating factor.

CONCLUSION

For all the foregoing reasons stated above, Respondent, Coterie Seven Enterprises Corporation, prays the writ of certiorari be denied.

Respectfully submitted,

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